Supreme Court, U.S.
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No. ____

# In the Supreme Court of the United States

JOSE ANTONIO MACIAS-PLACENCIA,
*Petitioner*,

v.

ATTORNEY GENERAL, JOHN ASHCROFT,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Does the United States Court of Appeals decision in *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961 (9th Cir. 2003), as applied to Petitioner, serve as a constitutionally impermissible infringement upon legislative authority?

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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Jose Antonio Macias-Placencia respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit (App., infra, A) dismissed the preceding petition for review in an unreported order filed on October 26, 2004. The Board of Immigration Appeals ("BIA") in the United States Department of Justice's Executive Office of Immigration Review (App., infra, B), on June 24, 2004, affirmed, without opinion, the decision of the Immigration Judge (App., infra, C) originally entered on April 20, 2003.

## JURISDICTION

The court of appeals entered its judgment for docket number 04-73342 on October 26, 2004 (App., infra, A) in an unreported decision and order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the court of appeals was invoked under 8 U.S.C. § 1252.

## STATUTORY PROVISIONS INVOLVED

Section 240A(b) of the Immigration and Nationality Act ("INA"), Section 1229b(b) of Title 8 of the United States Code Service established both that certain nonpermanent aliens in removal proceedings may apply for cancellation of such proceedings provided the alien can demonstrate: [1] continuous physical residence in the United States for ten

years immediately preceding such application, [2] good moral character during such ten year period, [3] lack of convictions for offenses defined in section 212(a)(2), 237(a)(2), or 237(a)(3), and [4] that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

In regards to establishing continuous physical presence during the aforementioned ten year period, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), codified in 8 U.S.C. § 1254(b)(2) specifically reads:

> *Treatment of certain breaks in presence*. An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

## STATEMENT

### A. Petitioner and His Immigration Status

Petitioner is thirty-one-year-old native and citizen of the Mexico. Petitioner crossed over into the United States on September 9, 1989. From the time Petitioner entered this country, Petitioner established firm roots within the United States which indicate a strong commitment to permanently reside within this country. In 1994, Petitioner was detained by

Immigration and Nationality[1] officers and was awarded voluntary departure from the United States only to return some four hours later. Petitioner immediately returned to the United States and has since resided continuously until the INS served him with a Notice to Appear on August 21, 2002.

**B. Proceedings Below**

On December 2, 2002, Petitioner filed with the immigration court his Application for Cancellation of Removal and Adjustment of Status for Certain Non-Permanent Residents pursuant to INA § 240A(b), 8 U.S.C. § 1229b. On April 30, 2003, The Immigration Judge ("IJ") found that notwithstanding the clear language of INA § 240A (which provides for a 90/180 day threshold for break in continuous physical presence), Petitioner's brief four hour absence in 1994 broke his continuous presence consequently making him removable. The IJ made no mention of the good moral character or hardship requirements under INA § 240A(b), so

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[1] On March 1, 2003, the functions of the former Immigration and Naturalization Service ("INS") were transferred from the Department of Justice to three bureaus (United States Customs and Enforcement, United States Customs and Border Protection, and United States Citizenship and Immigration Services) in the newly formed Department of Homeland Security (DHS). See Homeland Security Act of 2002, Pub.L.No. 107-296, 116 Stat. 2135 (Nov.25, 2002). Title 8 of the Code of Federal Regulations was reorganized and amended to reflect the resulting division of jurisdictions between DHS and Executive Office for Immigration Review, which includes the immigration court and BIA, and which remains an agency within the Department of Justice under the direction of the Attorney General. See 68 Fed.Reg. 10349 (Mar. 5, 2003)(available at 2003 WL 724287)

it is reasonable to assume the IJ made a positive finding in each category for Petitioner.

Petitioner timely appealed to the BIA, and on June 24, 2004, the BIA affirmed, without opinion, the holding of the IJ. Petitioner timely filed a petition for review with the Ninth Circuit Court of Appeals on July 6, 2004, and on July 28, 2004, that Court issued an order requesting Petitioner to show cause why the case should not be summarily disposed of in light of *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961 (9th Cir. 2003). Petitioner meritoriously answered the order to show cause, but on October 26, 2004, that Court issued an order, in docket number 03-73342, dismissing the petition for review (App., infra, A) in accordance with its own precedent in *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961 (9th Cir. 2003) and *Falcon Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003).

## REASONS FOR GRANTING THE PETITION

### I. THE QUESTION PRESENTED IS IMPORTANT.

#### A. THE NINTH CIRCUIT'S HOLDING IN *VASQUEZ-LOPEZ* CONSTITUTES A CONSTITUTIONALLY IMPERMISSIBLE JUDICIAL INFRINGEMENT INTO THE LEGISLATIVE ARENA.

Separation of Powers is the very corner stone of our government. The governmental roles of our Legislature and Judiciary are strictly defined by the United States Constitution. By ignoring the plain language of INA § 240A(d)(2), and holding that Petitioner's brief absence from the United States (which was LESS than the clear 90/180 time that Congress enumerated in the INA) constituted a break in

continuous physical presence, the IJ, in relying on *Vasquez-Lopez*, is in effect amending the statute. Congress specifically addressed the situation under which a alien's period of continuous physical residence shall be deemed to end. In doing so, Congress enacted a new definition of "continuous physical presence" in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996): Although the pre-1996 INA provided that "brief, casual, and innocent" departures were not breaks in continuous presence, *see* 8 U.S.C. § 1254(b)(2) (repealed 1996), IIRIRA excised that language and substituted the following:

> *Treatment of certain breaks in presence*. An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days. 8 U.S.C. § 1229b(d)(2).

The literal language therefore does NOT address breaks in presence other than those determined by length of time, individually or in the aggregate.

Despite this evident change in the relevant statutory regime, the Ninth Circuit's opinion in *Vasquez-Lopez* resurrects the pre-IIRIRA concept of "brief, casual, and innocent" departures. The opinion consequently denies Petitioner eligibility for cancellation of removal under 8 U.S.C. § 1229b(b)(1) because his departure, although for fewer than 90 days, was under threat of deportation. The Ninth Circuit clearly should have given effect to the language Congress chose pursuant to this Court's holding that "[w]hen Congress acts to amend a statute, we presume it intends its

amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397, 131 L. Ed. 2d 465, 115 S. Ct. 1537 (1995). Instead, the Ninth Circuit disregards IIRIRA's significant change in the continuous physical presence section of the INA.

### 1. IT IS NOT UNCOMMON FOR THIS COURT TO REVERSE THE NINTH CIRCUIT FOR JUDICIAL INFRINGEMENT UPON THE LEGISLATIVE ARENA.

In 1984, this Court, in *INS v. Phinpathya*, 464 U.S. 183, 189-90, 78 L. Ed. 2d 401, 104 S. Ct. 584 (1984), reversed the Ninth Circuit because, disregarding the plain words of the INA as it then read, the Ninth Circuit had created an exception to the continuous physical presence requirement for suspension of deportation in cases of non-"meaningfully interruptive" departures. This Court stated, in pertinent part:

> The ordinary meaning of these words does not readily admit any "exception[s] to the requirement of seven years of 'continuous physical presence' " in the United States to be eligible for suspension of deportation. . . [Without a moderating provision,] Congress meant this "continuous physical presence" requirement to be administered as written. *Id.* (internal citation omitted); *see also id.* at 195 (construing the INA to broaden the Attorney General's discretion improperly shifts authority to define the "continuous physical presence" requirement "from Congress to INS and, eventually, as is evident from the experience in this case, to the courts").

Congress amended the statute after *Phinpathya* to provide an exception for absences that were "brief, casual, and innocent" and did not "meaningfully interrupt" an alien's continuous physical presence. *See* 8 U.S.C. § 1254(b)(2) (repealed 1996). Applying the amended statute, the Ninth Circuit later concluded that a voluntary departure under threat of deportation is "*not* a brief, casual, and innocent absence from the United States" under former section 1254(b)(2). *See Hernandez-Luis v. INS*, 869 F.2d 496, 498 (9th Cir. 1989). (emphasis added)

Again, IIRIRA eliminated the "brief, casual, and innocent" exception, substituting a *bright-line rule* stating that the continuous physical presence requirement is not met if there is a single departure of more than 90 days or aggregate absences of more than 180 days. The former "brief, casual, and innocent" standard that 8 U.S.C. § 1229b(d)(2) replaced was preserved in two other parts of the statute in which it also existed before IIRIRA. *See* 8 U.S.C. §§ 1254a(c)(4) (temporary protected status), 1255a(a)(3)(B) (adjustment of status for pre-1982 entrants); accord 8 U.S.C. §§ 1254a(c)(4) (1995), 1255a(a)(3)(B) (1995).

Setting aside Congress's 1996 alterations and ignoring its deliberate inaction elsewhere in the INA[2], the opinion in

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[2] The static language of the two "brief, casual, and innocent" provisions that Congress left untouched in IIRIRA supports the conclusion that Congress would have been explicit had it wanted to preserve such an exception to the continuous physical presence requirement. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987) (holding that if "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion

*Vasquez-Lopez* accomplishes once more precisely what this Court specifically stated in *Phinpathya* that could *not* be done, which is, amending the statute Congress wrote. Here, the Ninth Circuit clearly inserts the "brief, casual, and innocent" standard *back into* the continuous physical presence provision, retaining the regime affirmatively deleted by Congress and replaced by a single, objective, clear rule.

Judicial amendment of the INA is no more proper when it limits aliens' rights than when it enhances them. Section 1229b(d)(2) should therefore be read as a "moderating provision," *See Phinpathya*, 464 U.S. at 190, creating an exception to the continuous physical presence requirement for any departure of 90 days or fewer, as long as the alien's absences do not exceed 180 days in the aggregate.

### 2. THE LACK OF THE STOP-TIME RULE IN THE VOLUNTARY DEPARTURE CONTEXT FURTHER EVIDENCES THE NINTH CIRCUIT'S IMPINGEMENT ON LEGISLATIVE AUTHORITY.

Bereft of statutory underpinning for its holding, the Ninth Circuit in *Vasquez-Lopez* deploys IIRIRA's "stop time" rule to justify its decision. *See Amended Opinion*, *post*, at 13494-95 ("To regard [petitioner] as having maintained his physical presence would be inconsistent with the statutory concept of voluntary departure and with the 'stop time' provisions of § 1229b(d)(1) in particular."). But the "stop time" provision does not apply to the class of aliens which

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or exclusion.") (quotation marks and citation omitted).

includes Petitioner here, for whom removal proceedings are *never* instituted and a Notice to Appear (formerly an Order to Show Cause) never issued. *See Ram v. INS*, 243 F.3d 510, 516 (9th Cir. 2001); 8 U.S.C. § 1229b(d)(1) ("any period of continuous residence or continuous physical presence in the United States *shall be deemed to end . . . when* the alien is *served* a *notice to appear*") (emphasis added).

Congress could have made the "stop time" rule apply to aliens who take voluntary departure in lieu of being served with a Notice to Appear, but chose not to do so. *See also* 8 U.S.C. § 1229b(c) (omitting the category of those who accept administrative voluntary departure from "Aliens Ineligible for Relief"). Section 1229b(d)(1), therefore, supports the contention that the continuous physical presence provision was not intended to be cut off through voluntary departure, not the panel's: Congress evidently decided to treat aliens subject to removal proceedings, with their attendant protections (and delays), differently from apprehended aliens for whom such proceedings were never instituted. Although the Ninth Circuit regards that distinction as anomalous, Congress clearly believed otherwise.

### B. THE DECISION GAVE IMPROPER DEFERENCE TO BIA INTERPRETATION IN *IN RE ROMALEZ-ALCAIDE*.

The opinion in *Vasquez-Lopez* claims to defer to the BIA's interpretation of the post-IIRIRA INA to include the now-superseded standard, invoking *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). The BIA's decision addressing the meaning of 8 U.S.C. § 1229b(d)(2), *In re Romalez-Alcaide*, 23 I. & N.

Dec. 423 (BIA 2002) (en banc), is not, however, entitled to *Chevron* deference[3].

An agency interpretation that adds to the statute "something which is not there" cannot stand. *United States v. Calamaro*, 354 U.S. 351, 359, 1 L. Ed. 2d 1394, 77 S. Ct. 1138 (1957). The Ninth Circuit has oddly noted:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end *is not the power to make law*, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Cal. Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460-61 (9th Cir. 1997)(emphasis added) (quoting *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134, 80 L. Ed. 528, 56 S. Ct. 397 (1936)).

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[3] In a Chevron analysis, the first step is to consider "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.' " *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 146 L. Ed. 2d 121, 120 S. Ct. 1291 (2000) (quoting *Chevron*, 467 U.S. at 843); *see also INS v. St. Cyr*, 533 U.S. 289, 320 n.45, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001) ("We only defer . . . to agency interpretations of statutes that, applying the normal tools of statutory construction, are ambiguous.") (internal quotation marks and citations omitted).

Because the BIA's inventive statutory interpretation cannot for a number of reasons be reconciled with Congress's 1996 amendments regarding breaks in continuous physical presence, *Romalez-Alcaide* is not worthy of deference. *See Chevron*, 467 U.S. at 844 ("a court *may not substitute* its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency") (emphasis added).

First, the BIA's interpretation condemns section 1229b(d)(2) to mere surplusage: If the provision is not viewed as a limitation on the continuous physical presence requirement, then there is no explicit limitation based on brevity of absence. *Phinpathya* precludes recognition of any implicit limitation. Section 1229b(d)(2) then loses all purpose: Without any explicit or implicit exception for shorter departures, there is no reason to provide that absences of more than a specified number of days are breaks in continuous physical presence. So the BIA's conclusion that "the statute does not specifically exempt all such shorter departures" and that "the statutory language . . . does not literally forgive any single departure of 90 days or less or aggregate departures of 180 days or less," *Romalez-Alcaide*, 23 I. & N. Dec. at 425-26, *cannot* be squared with *Phinpathya*.

Second, one of the BIA's rationales -- referred to by the Ninth Circuit in *Vasquez-Lopez* -- is that section 1229b(d)(2)'s title ("Treatment of certain breaks in presence") clarifies Congress's intent not to define all breaks in physical presence. However, Congress was undoubtedly referring to other parts of the INA that address the issue, *see, e.g.*, 8 U.S.C. §

1229b(b)(2)(B)[4], not to agency created, un-enumerated exceptions to the language of the statute. *Cf. Bhd.* of *R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 529, 91 L. Ed. 1646, 67 S. Ct. 1387 (1947) ("the heading of a section cannot limit the plain meaning of the text").

Third, the *Romalez-Alcaide* majority improperly considered what it called "Related Regulations," the same regulations relied on by the Ninth Circuit in *Vasquez-Lopez*. Those regulations implement the post-IIRIRA Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997), amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997)[5]. The *Romalez-Alcaide* majority held that, given the

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[4] This provision states in relevant part that: "an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and . . . battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2)."

[5] The regulations state that for aliens who fall under NACARA, "the applicant shall be considered to have failed to maintain continuous physical presence in the United States if he or she has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days. The applicant must establish that any period of absence less than 90 days was casual and innocent and did not meaningfully interrupt the period of continuous physical presence in the United States," 8 C.F.R. § 240.64(b)(2), and also that "a period of continuous physical presence is terminated whenever an alien is removed from the United States under an order issued pursuant to any provision of the Act or the alien has voluntarily departed under the threat of

binding nature of regulations on the BIA, "even though the regulation specifically applies only in the context of NACARA applications . . . it is not apparent how we could find the respondent eligible for cancellation of removal without adopting a construction of the statute that is directly at odds with the position adopted by the Attorney General in 8 C.F.R. § 240.64(b)(3)." *Romalez-Alcaide*, 23 I. & N. Dec. at 428; *but see id.* at 445 (Board Member Rosenberg, dissenting) ("we exceed our authority if we proceed to read a provision that simply seems 'related' into the regulations applicable to the respondent"). As all the BIA Board Members and the panel in this case agree, the regulation does not apply except to NACARA. It therefore deserves no Chevron deference save with regard to NACARA.

Fourth, as the Ninth Circuit recognized in *Vasquez-Lopez*, 343 F.3d at 13491 n.2, *Romalez-Alcaide incorrectly* drew upon the INA's reinstatement provision, 8 U.S.C. § 1231(a)(5), to support its holding. In a statement that is clearly misleading, the BIA majority wrote that "under the respondent's construction of the statute, an alien who departed under a formal order of removal could nevertheless retain eligibility for cancellation of removal, despite this statutory bar to all relief for persons who illegally return after being removed." *Romalez-Alcaide*, 23 I. & N. Dec. at 426. This reasoning is illogical and unfounded. *Romalez-Alcaide*, had he been removed, would, to the contrary, be ineligible for cancellation of removal upon his return. Section 1231(a)(5) says so, quite independently of any continuous physical

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deportation or when the departure is made for purposes of committing an unlawful act." *Id.* § 240.64(b)(3).

presence requirement[6]. But *Romalez-Alcaide*, like Vasquez-Lopez and Petitioner here, were at no time subject to an order of removal, so section 1231(a)(5) is inapplicable to neither. Section 1231(a)(5) can be enforced separately, without affecting administrative voluntary departures.

Fifth, after flailing for (and failing to find) any plausible statutory grounding for its holding, the *Romalez-Alcaide* majority relies on *its* understanding of IIRIRA's purpose and not Congress'. *See Romalez-Alcaide*, 23 I. & N. Dec. at 429 ("Congress sought to deter illegal immigration to the United States by curbing the incentive for aliens to extend their stays in this country and prolong their cases in order to gain immigration benefits."). In short, *Romalez-Alcaide* provides no analytical sustenance for the panel's decision.

### C. THERE IS CONFLICT BETWEEN THE NINTH AND TENTH CIRCUITS.

The Ninth Circuit's decision produces a statutory interpretation that is at odds with the approach taken by the Tenth Circuit when it analyzed the new continuous physical presence requirement of 8 U.S.C. § 1229b(d)(2). *See Rivera-Jimenez v. INS*, 214 F.3d 1213, 1218 (10th Cir. 2000)

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[6] *See* 8 U.S.C. § 1231(a)(5) ("If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, *under an order of removal*, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.") (emphasis added).

In *Rivera-Jimenez*, Petitioners appealed from the BIA's denial of their application for suspension of deportation. The BIA had based its decision on Petitioners' failure to establish seven years of continuous presence in the United States before service of the orders to show cause. Upon review, the Tenth Circuit vacated the BIA's decision, which had relied on the Board's conclusion that petitioners had not established the requisite period of continuous physical presence under the old "brief, casual, and innocent" standard, when the stop-time rule of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 should have been applied.

In remanding the question to the BIA, the Tenth Circuit commented: "We agree with the INS that petitioners' two-week return to Mexico in lieu of being placed in deportation proceedings was *not* brief, casual or innocent...*This is irrelevant, however, in light of the IIRIRA's special rules relating to continuous physical presence.*") *Id.* At 1218. (emphasis added)(quoting *Hernandez-Luis v. INS*, 869 F.2d 496, 498 (9th Cir. 1989).

### D. THE NINTH CIRCUIT'S INTERPRETATION OF WHAT BREAKS CONTINUOUS PHYSICAL PRESENCE IS ILLOGICAL AND PREJUDICIAL WHEN READ IN CONJUNCTION WITH OTHER CORRESPONDING PROVISIONS OF THE INA.

In its stout determination not to reward an alien who returned to the United States after taking administrative voluntary departure, the Ninth Circuit exhibits a short-sighted understanding of immigration law which has the prejudicial effect of potentially denying thousands of deserving non-permanent residents relief. Through IIRIRA, Congress made

the strictures leading to cancellation of removal extremely onerous, tightening the former requirements for suspension of deportation. *See Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 & n.4 (9th Cir. 2003). At the same time, Congress did intend some counterweight to the general policy of not rewarding extended illegal stays. Otherwise, there would be no cancellation of removal proviso at all.

Allowing aliens like Petitioner to attempt passage through the eye of one of several thousand needles does not run counter to the general restrictiveness of the post-IIRIRA INA[7]. Instead, fairly evaluating the continuous physical presence requirement merely implements a second, equally valid congressional policy, recognizing the need for exceptions in rare situations -- those in which the alien can show "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D). This very limited availability of cancellation of removal, like suspension of deportation before IIRIRA, effects "Congress's judgment that presence of [extended] length was likely to give rise to a sufficient commitment to this society through establishment of roots and development of plans and expectations for the future to justify an examination by the Attorney General of the circumstances of the particular case to determine whether deportation would be unduly harsh." *Kamheangpatiyooth v. INS*, 597 F.2d 1253, 1256 (9th Cir. 1979).

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[7] Cancellation of removal applies only to a small group of aliens, out of which no more than 4,000 can be granted relief per fiscal year. See 8 U.S.C. § 1229b(e)(1). In 1997, the first year that the quota was in effect, the limit was reached in the month of February. *See* Stephen H. Legomsky, *Immigration and Refugee Law and Policy* 465 (1997).

Such pockets of immigration law, it is true, include counter-intuitive incentives to come illegally to the United States and to remain here. In this sense, "the field is the legal equivalent of non-Euclidean geometry." *Vasquez-Lopez*, 343 F.3d at 968. The Ninth Circuit "nonetheless tries to conjure a straight line out of one of the INA's curvatures." *Id.*

Cancellation of removal is a perfect illustration. To have even a chance of obtaining this form of relief, which is rationed by quota such that it amounts to a lottery of mercy, aliens are better off if they keep breaking the law by remaining undetected for ten years. So it is no proof of Congress's intent regarding the availability of cancellation of removal to aliens in Petitioner's situation that the statute, overall, aims to facilitate removal of illegal aliens. Rather, the INA does provide some possibility of relief from removal for some illegal aliens and, with precision, separates those illegal aliens who may merit cancellation of removal from those who do not. Under the statute's terms, an alien's repeated illegal entry after an administrative voluntary departure is simply not dispositive of this inquiry.

That aliens such as Petitioner necessarily entered illegally twice rather than once can be considered under the "good moral character" prong of the cancellation of removal test. See 8 U.S.C. §§ 1229b(b)(1)(B), 1101(f)(8) ("The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."). A proper reading of the INA thus leaves the implementation of section 1229b(d)(2) to the agency for case-by-case resolution, while the panel's interpretation reimposes an across-the-board exclusion that Congress excised. *See Cardoza-Fonseca*, 480 U.S. at 448 ("The narrow legal question whether the two standards [an old and a new one] are the same is, of course, quite different from

the question of interpretation that arises in each case in which the agency is required to apply [the statute] . . . to a particular set of facts.").

In sum, Congress could have continued to include the "brief, casual, and innocent" standard in the post-IIRIRA INA for purposes of continuous physical presence. Simply put, it did not. Congress could have made administrative voluntary departures a ground of ineligibility for cancellation of removal. Again, it did not. Congress could have applied the "stop time" rule to illegal aliens who accept administrative voluntary departures, rather than requiring a Notice to Appear to end the accrual of continuous physical presence. Not surprisingly, it did not.

The Ninth Circuit in *Vasquez-Lopez* and the BIA majority in *Romalez-Alcaide* nevertheless acted as super-legislatures, relying on their perception that Congress had "inadvertently negated the *effect* of the respondent[s'] departures for purposes of accruing continuous physical presence." *Romalez-Alcaide*, 23 I. & N. Dec. at 429 (emphasis added). Neither agencies nor courts are authorized to repair Congress's supposed statutory oversights. Morevoer, the federal courts are bound to follow IIRIRA's amendments as they exist, not as they might look if Congress shared the panel's and the BIA majority's policy preferences.

## II. ANY AMBIGUITIES IN DEPORTATION STATUTES SHOULD BE CONSTRUED IN FAVOR OF PETITIONER.

As previously discussed, Section 240A contains not a single reference to an alien's period of physical presence ending after a voluntary departure. According to long standing principals of statutory interpretation, when a provision is

omitted from a code section, it must be assumed that the exclusion was intentional. *Russello v. United States*, 464 U.S. 16, 23 (1983).

Section 240A clearly states how period of physical presence can be broken. Section 240A is equally clear in what it does not state. It is contrary to the rules of statutory interpretation to read into Section 240A any provisions that are hostile to respondent. Longstanding principles of statutory interpretation mandate that any lingering ambiguities in Section 240A be construed in favor of respondent. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449.

## CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(619) 688-1174

*Counsel for Petitioner*

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## APPENDIX A

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**NO. 04-73342**

**[Filed: October 26, 2004]**

| | |
|---|---|
| Jose Antonio Macias-Placencia, Petitioner, | ) |
| v. | ) |
| John Ashcroft, Attorney General, Respondent. | ) |

On Petition for Review of an Order
of the board of Immigration Appeals

Before: KLEINFELD, TASHIMA and GOULD, Circuit Judges.

**MEMORANDUM***

Submitted October 14, 2004**

We have reviewed petitioner's response to the court's July 28, 2004, order to show cause. The questions raised by this petition for review are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard). Accordingly, this petition for review is denied. *See Falcon Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003); *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961 (9th Cir. 2003).

The temporary stay of removal confirmed by Ninth Circuit General order 6.4(c) shall continue in effect until issuance of the mandate.

All pending motions are denied as moot.

**PETITION FOR REVIEW DENIED.**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

## APPENDIX B

**U.S. Department of Justice**
**Executive Office for Immigration Review**
**Falls Church, Virginia 22041**

**[Dated: June 24, 2004]**

**File:** A79-156-467- SAN DIEGO

**In re:** MACIAS-PLACENCIA, JOSE ANTONIO

**IN REMOVAL PROCEEDINGS**

**APPEAL**

**ON BEHALF OF RESPONDENT:** Murray D. Hilts

**ON BEHALF OF DHS:** Kathryn Stuever,
Assistant Chief Counsel

**Decision of the Board of Immigration Appeals**

**ORDER**

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set

forth by the Immigration Judge and the statue, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days form the date of this order or any extension beyond that time as may be grated by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.2(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. See section 240B(d) of the Act.

/s/_____
FOR THE BOARD

## APPENDIX C

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**UNITED STATES IMMIGRATION COURT**
**San Diego, California**

**NO. A 79 156 467**
**[Filed: April 30, 2003]**

**In the Matter of:** **Jose Antonio Macias-Placencia**
**Respondent**

**IN REMOVAL PROCEEDINGS**

**Charge:** Section 212(a)(6)(A)(i) of the Immigration and Nationality act (present without admission or parole).

**Applications:** Cancellation of removal for certain non-permanent residents under Section 240A(b)(1) of the Immigration and Nationality Act.

**On Behalf of Respondent:**
Murray D. Hilts
1011 Camino Del Rio South
Suite 350
San Diego, California 92108

**On Behalf of Service:**
Katherine Stuever
Assistant District Counsel
Department of
Homeland Security

**ORAL DECISION OF THE IMMIGRATION JUDGE**

The respondent herein is a native and citizen of Mexico. He was place under removal proceedings on August 21, 2002

with the issuance of a Notice to Appear (Exhibit 1). In this document the Government alleges that the respondent is not a citizen or national of the united States but is a native and citizen of Mexico who arrived in the United States at or near Tecate, California on or about September 9, 1989. The Government alleges the respondent was not them admitted or paroled after inspection by an Immigration officer and the respondent was charged with removability under Section 212(a)(6)(A)(i) of the Immigration and nationality Act as an alien present in the united States without being admitted or paroled or who arrived in the United States at any time or place other than as designated by the Attorney General.

During the course of these proceedings, the respondent, through counsel, admitted the truth of the factual allegations contained in the Notice to Appear and conceded removabilty on the basis of the charge set forth therein (see Exhibit 2). Based upon these admissions and concessions, I find the respondent's removabilty has been properly established as required by law.

The respondent had made an application for cancellation of removal pursuant to the provisions of Section 240A(b)(1) of the Immigration and Nationality Act. Alternatively, the respondent requests voluntary departure at the conclusion of proceedings.

Section 240A(b) provides that the attorney general may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if he has been physically present in the United States by a continuous period of not less than 10 ears immediately receding the date of his application, but during all of such period he has been a person of good moral character and he establishes that his

removal would be result in exceptional and extremely unusual hardship to his spouse, parent, child who is a united States citizen or alien lawfully admitted for permanent residence.

If the respondent established that he meets these statutory requirements, he must also show that he is deserving of this extraordinary form of a relief as a matter of discretion.

The respondent has submitted his application for cancellation of removal along with several supporting documents (see group Exhibit3). At page 2 of this application, item 25, the respondent has candidly and forthrightly admitted that in 1994 he was voluntarily returned to Mexico by the Immigration officials of the United States. His application indicates that approximately four hours later he returned to the United States without being inspected and admitted by and Immigration officer. The respondent concedes, through counsel, that this voluntary return was under a threat of the institution of deportation or removal proceedings.

In the case of In re Romalez, 23 I&N Dec. 423 (BIA 2002), the Board of Immigration Appeals held that for purposes of determining eligibility for cancellation of removal for non-permanent residents continuous physical presence is deemed to end at the time an alien is compelled to depart the United States under threat of the institution of deportation or removal proceedings. It would appear, based upon the information in the respondent's application and the concessions made on his behalf by counsel that he falls squarely within the provisions of the Romalez case. The Romalez decision is binding in this court. At the time the respondent suffered a voluntary return or voluntary departure under threat of institution of deportation or removal proceedings, the continuous physical presence that he had acquired in the United States was deemed to end. At that time,

the respondent had been in the United States for five years or less. At the time of that voluntary return, it does not appear that the respondent would have been eligible for or qualified for any relief from removal or deportation other than through the voluntary departure process.

The court also notes that the 9th Circuit Court of Appeals has ruled in the case of Vasquez-Lopez v. Ashcroft that a voluntary return at the hands of Immigration officials interrupts the requisite continuous physical presence for cancellation of removal proceedings. In that case, the respondent had illegally entered the United States in 1988 and later made an application for cancellation of removal for non-permanent residents. During the course of his removal proceedings he admitted that at some point during the period from 1992 to 1994 he was arrested by Immigration authorities, was granted voluntary departure and was escorted to Mexico by the border patrol, shortly thereafter reentering the United States illegally. In considering whether or not that voluntary departure in lieu of removal interrupted the requisite continuous physical presence, the respondent was required to show for cancellation of removal. The 9th Circuit Court of Appeals stated that under the law existing at the time of Vasquez' departure from Mexico a voluntary departure under threat of coerced deportation did constitute a break in continuous physical presence. The 9th Circuit noted that it had stressed that those types of departures although termed voluntary, were in fact coerced by threats of deportation. The 9th Circuit stated "such departures were in lieu of deportation and accepted [by the alien as] the lesser of two evils." The 9th Circuit went on to state that "as such the alleged voluntary departures were the result of an implied agreement that [the alien] would not return. Otherwise, there would be no reason behind the procedure of voluntary departures in lieu of deportation proceedings." In the Vasquez case the respondent

acknowledged that a break in his continuous physical presence occurred under the law as it existed at the time of the departure, but insisted that Congress has since altered applicable law. More particularly the respondent made reference to the cancellation of removal statute adopted by Congress in 1996 which, at Section 240A(b)(1)(2) described termination of continuous physical presence and the treatment of certain breaks in physical presence. The respondent pointed out that the statutory provisions deleted the portion of the prior statute excusing the absences that were "brief, casual and innocent and did not meaningfully interrupt the continuous physical presence." The respondent argued that Section 240A(b)(2) substituted for this deleted wording. The respondent argued that Congress had established a new bright line rule that all absences are to be ignored if they last less that 90 days and do not exceed 180 days in the aggregate.

The 9th Circuit Court of Appeals disagreed with this argument noting that while the statute provides some incentives to an alien to apply for voluntary departure and to avoid removal proceedings, nothing therein suggests that an alien who commits to that departure in order to avoid proceeding is entitled to continue to accruing presence so as to become eligible for other discretionary relief. The 9th Circuit Court of Appeals concluded that the voluntary departure to which the respondent therein admitted was interruptive of the continuous physical presence requirement of the cancellation of removal stature. The respondent was found to be ineligible for cancellation of removal.

Following the Romalez case decided by the Board of Immigration appeals and the Vasquez-Lopez case decided by the 9th Circuit Court of Appeals, the Court herein concluded that the respondent is precluded from establishing the requisite ten years continuous physical presence by virtue of his

voluntary return in 1994. I conclude that the respondent is statutorily ineligible for the requested relief and his application for this relief must, therefore, be denied.

The respondent alternatively requests voluntary departure at the conclusion of the proceedings under Section 240B(b) of the Act. The respondent represents, through counsel, that he meets the statutory requirement for this relief and the Government is not opposed to granting this lesser form of relief.

To qualify for this relief the respondent must show that he has been physically present in the United States for at least one year immediately preceding the date the Notice to Appear was served, that he has been a person of good moral character for at least five years immediately preceding the application and further establishes by clear and convincing evidence that he has the means to the depart the United States and the intention to do so. It has been represented that the respondent meets these requirements. Permission to depart voluntarily under this section is not a valid a period exceeding 60 days and any alien permitted to depart voluntarily under this section is required to post a voluntary departure bond in an amount necessary to insure that he will depart to be surrendered upon proof that he has departed the United States within the time specified. If an alien is permitted to depart voluntarily under this section and fails to timely do so the alien shall be subjected to a civil penalty of not less than $1,000 and not more than $5,000 and shall be ineligible for a period of 10 years for voluntary departure, cancellation of removal, adjustment of status, change of status and registry.

The respondent herein will be granted voluntary departure at the conclusion of the proceedings.

## ORDER

IT IS HEREBY ORDERED the respondent's application for cancellation of removal for non-permanent residence be and the same as hereby denied.

IT IS FURTHER ORDERED that the respondent be granted in lieu of an order of removal, the privilege of voluntary departure at the conclusion of proceedings, such departure to occur on or before June 30, 2003.

IT IS FURTHER ORDERED that should the respondent fail to timely depart the United States, without further notice or proceedings the respondent shall thereupon be ordered removed from the United States to Mexico on the basis of the charge contained in the Notice to appear.

IT IS FURTHER ORDERED that as a condition to this grant of voluntary departure the respondent must post a voluntary departure bond in the sum fo $500 no later than the close of business on May7, 2003.

IT IS FURTHER ORDERED that should the respondent fail to timely post said bond with the Department of Homeland Security the privilege of voluntary departure shall be withdrawn without further notice or proceeding and the respondent shall thereupon be ordered removed from the United States to Mexico on the basis of the charged contained in the Notice to Appear.

/s/_____
Kenneth A. Bagley
Immigration Judge

(2)

No. 04-1300

# In the Supreme Court of the United States

JOSE ANTONIO MACIAS-PLACENCIA, PETITIONER

*v.*

ALBERTO R. GONZALES, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether, for purposes of determining eligibility for cancellation of removal under 8 U.S.C. 1229b(b), a voluntary departure from the United States under threat of removal ends a period of continuous physical presence.

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# In the Supreme Court of the United States

No. 04-1300

JOSE ANTONIO MACIAS-PLACENCIA, PETITIONER

*v.*

ALBERTO R. GONZALES, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. The order of the Board of Immigration Appeals (Pet. App. 3a) and the decision of the immigration judge (Pet. App. 4a-12a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 26, 2004. The petition for a writ of certiorari was filed on January 18, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, Div. C, 110 Stat. 3009-546 (8 U.S.C.

1101 *et seq.*), one of the forms of discretionary relief available in immigration proceedings was suspension of deportation. To qualify for suspension of deportation, an alien was required to have maintained continuous physical presence in the United States for the seven-year period immediately preceding the date of the application. 8 U.S.C. 1254(a)(1) (1994). An alien who temporarily left the United States was not "considered to have failed to maintain continuous physical presence in the United States * * * if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence." 8 U.S.C. 1254(b)(2) (1994).

IIRIRA repealed the suspension-of-deportation provision and enacted a new form of discretionary relief entitled cancellation of removal. 8 U.S.C. 1229b. For an alien who is not a lawful permanent resident, eligibility for cancellation of removal requires continuous physical presence in the United States for the ten-year period immediately preceding the date of the application. The cancellation provision contains a section entitled "Termination of continuous period," which specifies, *inter alia*, that the issuance of a Notice to Appear generally ends a period of continuous physical presence. 8 U.S.C. 1229b(d)(1). The provision also establishes that a single departure from the United States that lasts for more than 90 days, or multiple departures that last for more than 180 days in the aggregate, interrupt continuous physical presence. 8 U.S.C. 1229b(d)(2).

2. Petitioner is a native and citizen of Mexico. He entered the United States without inspection on or about September 9, 1989. In August 2002, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner under 8 U.S.C. 1182(a)(6)(A)(i) as an

alien present in the United States without being admitted or paroled. Pet. App. 5a-6a.[1]

a. At his removal hearing, petitioner conceded that he was removable from the United States, but he applied for cancellation of removal under 8 U.S.C. 1229b(b). Pet. App. 6a. Petitioner admitted in his application that, in 1994, he had been apprehended by immigration officials and was granted an administrative voluntary departure in lieu of being placed in deportation proceedings. See *id.* at 7a; 8 U.S.C. 1252(b) (1994) (allowing INS to grant administrative voluntary departure, without commencing deportation proceedings, to an alien who "admits to belonging to a class of aliens who are deportable").[2] Petitioner also admitted that, approximately four hours after he voluntarily departed for Mexico, he returned to the United States without inspection. Pet. App. 7a.

The immigration judge (IJ) denied petitioner's application for cancellation of removal on the ground that peti-

---

[1] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice, and its enforcement functions were transferred to the Department of Homeland Security (DHS). Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. This brief continues to refer to the INS with respect to the events that predated the reorganization.

[2] Before the enactment of IIRIRA, one statutory provision governed the grant of voluntary departure before the initiation of deportation proceedings (*i.e.*, "administrative" voluntary departure), 8 U.S.C. 1252(b) (1994), and a separate provision governed the grant of voluntary departure during deportation proceedings, 8 U.S.C. 1254(e)(1) (1994). After IIRIRA, a single provision confers authority to grant voluntary departure both before and after the commencement of removal proceedings. See 8 U.S.C. 1229c(a)(1) (stating that the "Attorney General may permit an alien voluntarily to depart the United States * * * in lieu of being subject to [removal] proceedings * * * or prior to the completion of such proceedings").

tioner was "precluded from establishing the requisite ten years continuous physical presence by virtue of his voluntary return [to Mexico] in 1994." Pet. App. 9a-10a. The IJ relied in part on *Vasquez-Lopez* v. *Ashcroft*, 343 F.3d 961 (9th Cir. 2003), which held that administrative voluntary departure terminates a period of continuous physical presence for purposes of determining eligibility for cancellation of removal. See Pet. App. 8a-9a. The IJ granted petitioner voluntary departure and ordered that he be removed if he did not timely depart. *Id.* at 11a-12a.

b. On June 24, 2004, the Board of Immigration Appeals (BIA) summarily affirmed the decision of the immigration judge. Pet. App. 3a.

3. Petitioner filed a petition for review in the court of appeals. On July 28, 2004, the court issued an order requesting petitioner to show cause why the petition for review should not be summarily denied. Pet. App. 2a. On October 14, 2004, the court summarily denied the petition, ruling that the questions raised were "so insubstantial as not to require further argument." *Ibid.* (citing, *inter alia*, *Vasquez-Lopez*, *supra*).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioner argues (Pet. 4-19) that the court of appeals erred in relying on *Vasquez-Lopez* v. *Ashcroft*, 343 F.3d 961 (9th Cir. 2003), as a basis for denying his petition for review. In petitioner's view, *Vasquez-Lopez* erred in holding that an administrative voluntary departure in lieu of deportation terminates continuous physical presence for purposes of determining eligibility for cancellation of removal. Petitioner's argument is grounded in his contention (Pet. 6)

that IIRIRA effected a "significant change in the continuous physical presence" requirement.

Petitioner observes (Pet. 7) that, prior to IIRIRA, a "brief, casual, and innocent" departure from the United States did not interrupt a period of continuous physical presence under the pre-existing suspension-of-deportation provision. 8 U.S.C. 1254(b)(2) (1994). An administrative voluntary departure did not qualify as a "brief, casual, and innocent" departure, and therefore was deemed to end a period of continuous physical presence. See *Hernandez-Luiz* v. *INS*, 869 F.2d 496 (9th Cir. 1989). Petitioner observes that IIRIRA's cancellation-of-removal provision does not retain an explicit exception for "brief, casual, and innocent" departures, but specifies two relevant situations that terminate a period of continuous physical presence: (i) if the alien departs on any single occasion for a period exceeding 90 days or on multiple occasions for a cumulative period exceeding 180 days, 8 U.S.C. 1229b(d)(2); or (ii) if the alien is served with a Notice to Appear for removal proceedings, 8 U.S.C. 1229b(d)(1). Petitioner concludes (Pet. 7-9) that, after IIRIRA, *no* departure of less than 90 days can be considered to interrupt a period of continuous physical presence, at least as long as no Notice to Appear has been served by the time of the departure.

Petitioner's argument lacks merit and was correctly rejected by the court of appeals in *Vasquez-Lopez*. The fact that, under IIRIRA, *any* departure of more than 90 days terminates a period of continuous physical presence in no way establishes that *no* departure of less than 90 days terminates a period of continuous physical presence. IIRIRA established an automatic rule for a departure that exceeds 90 days, but did not purport to establish the opposite automatic rule for a departure of less than 90 days. Indeed, the provision establishing the automatic 90-day (and 180-day)

ceiling is entitled "Treatment of *certain* breaks in presence," 8 U.S.C. 1229b(d)(2) (emphasis added), confirming that the provision does not establish an exclusive rule for determining whether a departure terminates a period of continuous physical presence. See *Vasquez-Lopez*, 343 F.3d at 972.

The "stop time" rule in 8 U.S.C. 1229b(d)(1)(A), which establishes that the issuance of a Notice to Appear generally is deemed to end a period of continuous physical presence, supports the conclusion that an administrative voluntary departure terminates a period of continuous physical presence. Petitioner does not dispute that a period of continuous physical presence is terminated by a voluntary departure granted after the commencement of removal proceedings (*i.e.*, after issuance of a Notice to Appear). An administrative voluntary departure in lieu of formal deportation, granted before the commencement of removal proceedings, should be treated no differently.

Indeed, the statutory provision governing voluntary departures specifies that the grant of an administrative voluntary departure is "in lieu of" subjecting the alien to removal proceedings. 8 U.S.C. 1229c(a)(1). An alien who is granted administrative voluntary departure "in lieu of" being subject to removal proceedings—no less than an alien who is served with a Notice to Appear for removal proceedings—ceases to accrue "continue physical presence" in the United States for purposes of maintaining eligibility for cancellation of removal. See *Vasquez-Lopez*, 343 F.3d at 973-974. The very premise of voluntary departure is that the alien agrees to *leave* the country (and not to return except as a lawful entrant). That premise is squarely inconsistent with maintaining *continued* physical presence within the country. See *id.* at 974. A contrary conclusion would give an alien who agrees to voluntarily depart an

incentive to return unlawfully within 90 days so that he can maintain eligibility for cancellation of removal. Congress could not have intended that result.

2. The decisions below and in *Vasquez-Lopez* are consistent with the BIA's decision in *In re Romalez-Alcaide*, 23 I. & N. Dec. 423 (2002) (en banc). The BIA concluded in *Romalez-Alcaide* that an administrative voluntary departure terminates a period of continuous physical presence for purposes of establishing eligibility for cancellation of removal.

The factual circumstances at issue in *Romalez-Alcaide* precisely parallel those in this case. There, as here, the alien was granted administrative voluntary departure in 1994, but he unlawfully returned within one or two days. 23 I. & N. Dec. at 423. In concluding that his voluntary departure terminated the alien's continuous physical presence, the BIA relied on: (i) the language and purpose of the relevant statutory provisions, including the "stop time" provision, the provision establishing a 90-day and 180-day ceiling for departures, and the provisions governing voluntary departure; (ii) the pre-IIRIRA decisions holding that voluntary departure under threat of deportation breaks a period of continuous physical presence; and (iii) regulations promulgated by the Attorney General under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, Tit. II, § 203(b), 111 Stat. 2198, which provide that the voluntary departure of aliens subject to NACARA terminates their continuous physical presence in the United States, see 8 C.F.R. 240.64(b)(3). As the court in *Vasquez-Lopez* correctly concluded, the BIA's decision in *Romalez-Alcaide* is entitled to deference. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (observing that the "BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a

process of case-by-case adjudication") (internal quotation marks omitted).

3. Contrary to petitioner's argument (Pet. 14-15), the court of appeals' decisions below and in *Vasquez-Lopez* do not conflict with *Rivera-Jimenez* v. *INS*, 214 F.3d 1213 (10th Cir. 2000). In *Rivera-Jimenez*, the BIA had denied suspension of deportation on the ground that the alien's voluntary departure was not "brief, casual, and innocent" under pre-IIRIRA law, 8 U.S.C. 1254(b)(2) (1994). The court of appeals held that the case was governed by the post-IIRIRA rules for determining continuous physical presence rather than by pre-IIRIRA law. *Rivera-Jimenez*, 214 F.3d at 1216-1218. The court did not apply the post-IIRIRA rules, however, and made no suggestion that voluntary departure would fail to terminate continuous physical presence after IIRIRA. Instead, the court remanded to the BIA for the BIA's application in the first instance of the rules established by IIRIRA. *Id.* at 1218. In doing so, the court emphasized that there was, at that time, "no administrative interpretation" of the provisions enacted by IIRIRA, and that such an interpretation would be accorded considerable weight. *Ibid.* Accordingly, far from conflicting with the court of appeals' decisions below and in *Vasquez-Lopez*, the decision in *Rivera-Jimenez* indicates that the Tenth Circuit would now agree with the holding of *Vasquez-Lopez* that the BIA's subsequent interpretation in *Romalez-Alcaide* is entitled to deference.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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